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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, et. al., *Petitioners*

v.

NEW YORK STATE DEPARTMENT OF LABOR, et. al., *Respondents*

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ON BEHALF OF CENTER ON NATIONAL LABOR POLICY

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MOTION OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE POSITION OF NEW YORK TELEPHONE COMPANY

Center on National Labor Policy hereby respectfully moves pursuant to this Court's Rule 42 for leave to file its brief *amicus curiae* in support of the position of New York Telephone Company. Consent was sought from all parties but was not granted. All of these documents have been filed with the Clerk.

The accompanying brief urges this Court to reverse the holding of the United States Court of Appeals in *New York Telephone Company, et al.* v. *New York State Department of Labor, et. al.*, No. 77-961.

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers. Private pressure groups, such as organized labor groups, have a history of significant impact on the rights of the public, consumers, taxpayers, and workers. As this Court recognized in *Connell Construction, Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers. . . ." When organized labor pressure is supported by a state government policy, as in the case at bar, significant questions are raised concerning the civil rights of other affected parties—the public, consumers, taxpayers, and workers.

The Center, as a public interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to collective rights of pressure groups such as labor unions. Where state policy gives an advantage to a private association engaged in coercive activity through payment of monetary benefits, the state is answerable for the impact on the rights of individuals.

Because Center on National Labor Policy can bring to this case a diverse perspective not presently represented, the Center's participation can assist the Court in obtaining full consideration of public interest issues.

Accordingly, Center on National Labor Policy respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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BRIEF OF CENTER ON NATIONAL LABOR POLICY AS *AMICUS CURIAE*

INTEREST OF *AMICUS*

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers.

When organized labor pressure is supported by a state policy of benefits to pressure group members, significant constitutional questions are raised concern-

ing the individual rights of other affected parties. The Center, as a public interest organization, believes that individual rights of consumers, taxpayers, workers, and public citizens should be paramount to the collective privileges of pressure groups such as labor unions. Where state action undergirds the coercive power of such groups, the impact on the public interest may be substantial. Consequently, the Center's concerns about this impact are significant.

Further background and interests of *amicus* have been detailed in the preceding motion for leave to file this brief.

INTRODUCTION

Some labor union members elected not to work for their employer the New York Telephone Company for approximately seven months in 1971 and 1972. Pursuant to New York state law, the state gave these non-working unemployed union members monetary benefits amounting to approximately $49 million.

The intentions of Congress in requiring government neutrality in national labor policy contemplated not only a balancing of power, but also the basic constitutional institutions protecting the right to contract for employment.

ARGUMENT

State Monetary Benefits to Persons Who Elect Not to Work Is a State Intrusion Into the Employment Contract Prohibited by the Contract Clause Because It Is Adverse to the Public Interest.

States may not pass any "Law impairing the Obligation of Contracts. . . ." U.S. Const. art. I, § 10, cl. 1. Contract obligations may not be impaired by state laws which would favor one party by either benefiting one

party or burdening one party. Of course, the contractual interference referred to here is a prospective chilling of the employment contract. But prospective contract impairment is not encompassed by the existing view of this Court. *Ogden* v. *Saunders,* 25 U.S. [12 Wheat.] 213, 359. Nevertheless, when examined with the Ex Post Facto Clauses, more recent scholarly research makes clear that the Contract Clause applies to all laws impairing the obligation of contracts, "whether previously formed *or not.*" CROSSKEY, POLITICS AND THE CONSTITUTION 352 (1953). Indeed, the constitutional history and the obvious relationship between the Contract Clause and the Commerce Clause evidenced a clear intention of the framers to guarantee commercial freedom by vesting complete commercial power in the national government in order to preempt state impairments such as is presented in the case at bar. Crosskey, 355-60.

However, the Contract Clause has been held not to interfere with a state in its legitimate exercise of economic regulation in "the vital interests of its people." *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 434 (1934).

Yet the Contract Clause has vitality. The contract right protects the public, as well as the individual. The permitting of some state economic tinkering contemplates, not just the possible benefit, but the potential harm to economic processes by an impairment of the contract right. In other words, a general public good achieved with minimal interference with individual rights is constitutional.

However, drastic altering of economic structure to the detriment of traditional individual property rights

is not permissible. For example, a basic procedural change in the law of collateral security was characterized by Justice Cardozo as "an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." *Worthen Co.* v. *Kavanaugh,* 295 U.S. 56, 62 (1935).

The case at bar is analogous. The employment bargain, and, indeed any contract, is a *quid pro quo*—compensation for work. Here the state intrudes upon the bargain and offers something for nothing—compensation for no work. Where mutual agreement was previously encouraged by the certainty of contract, the state's intrusion obfuscates the consideration for the employment contract and renders amorphous the consistency of the *quid pro quo.* Clearly, this is an unhealthy basic procedural change which strikes at the heart of the employment contract. Like *Worthen Co.,* the situation at bar represents an oppressive destruction of the incidents that have traditionally made an employment contract an attractive and valuable economic act. And as in *Worthen Co.,* the state's economic intrusion is no mere tinkering but a fundamental and unconstitutional alteration of the economic process.

Notwithstanding the foregoing defect, the state's action is also impermissible if against the public interest. While this Court has found the Contract Clause undisturbed by some state regulation in "the vital interests of its people," *Home Building & Loan Ass'n.* v. *Blaisdell,* 290 U.S. 398, 434 (1934), activity counter to the broad public interest is prohibited. Allowance for fine-tuning was never intended to encourage wholesale trampling of citizen rights. Thus where a state's action undermined the certainty of land sales, this Court held the law void as an assault in "the rights of . . . purchaser[s]. . . ." *Wood* v. *Lovett,* 313 U.S. 362, 369 (1941).

In examining the case at bar the adverse impact this state's action has on the public must also be considered. Actions affecting organized labor power cannot be considered in a vacuum. As this Court has previously recognized, labor union power "could result in significant adverse effects on the market and on consumers. . . ." *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 625 (1975).

In the instant case, $49 million in public funds was transferred to union members voluntarily out of work. These voluntary non-workers produced absolutely nothing in exchange for the $49 million. The $49 million represents money earned by other citizens, taxpayers, companies, and proprietors. Thus, $49 million of the earnings and profits of people who were working was transferred to people who voluntarily were not working. The magnitude and manifest unfairness of the transfer of that money from productive citizens to those voluntarily unproductive is sufficiently adverse to the public interest to invoke the safeguards of the Contract Clause.

It is clearly no less an affront to the public interest to force the New York Telephone Company to pay $40 million. The company is a human economic structure —owned, operated, and patronized by people. Ultimately, any burden of the company becomes the burden of those people. And the public has witnessed enough rate increase hearings to know that the $40 million will still be paid by the consuming public. In summary, some economic fine-tuning in the public interest may not be offensive to the Contract Clause. But state med-

dling in the employment contract which shifts economic rights to the detriment of the broad public interest cannot escape the bar of the Contract Clause.

Consequently, the state's intrusion into the employment contract violates the Contract Clause both because it is a radical alteration of the traditional economic structure and because it is counter to the broad public interest.

CONCLUSION

This court is seldom called upon to invoke the prohibition of the Contract Clause. And clearly, this Court has come a long way down the road towards abstention in commercial matters. Yet abstention here would cause an absurd result which would not justify adherence to an old, erroneous interpretation of the Contract Clause as "retrospective only". Indeed, the patently unfair consequences of the state statute awakens this dormant guardian of freedom. Here the state statute would topple the Constitutional foundations upon which individual rights depend and flout the public interest.

Because the history of chaos from governmental interference in the commercial arena will point up the error of ignoring the intention of the framers, now is the time for a reevaluation of the Court's treatment of the Contract Clause protections. The public interest demands an across the board rule preventing the heavy hand of the state from thrusting itself into the delicate mechanism of the employment contract. Consequently, Center on National Labor Policy respectfully requests that this Court strike down the offending law as unconstitutional.

Respectfully submitted,

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